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NO. 1000

In The Supreme Court of the United States

OCTOBER TERM, 1964

CLARENCE H. McKINLEY,

Appellant,

v.

CHRIS A. REILLY, C. STANLEY CLEGG, and HUGH DUGAN, as Members of the Arizona State Board of Funeral Directors and Embalmers,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This case is one of the first impression under the Equal Protection Clause of the United States Constitution. It involves the constitutionality of a state statute and regulation of licensing of certain Arizona residents to carry on the business of "funeral directing", whereas others are deprived of this property right.

Appellant Clarence McKinley appeals to the Supreme Court of the United States from the decision of the Supreme Court of the State of Arizona entered June 18, 1964, which decision became final by order of the Court in denying rehearing entered October 20, 1964 (two Justices dissenting). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at 96 Ariz. 176, 393 P.2d 268 (1964), and is reprinted as Appendix A. Rehearing was denied without opinion. The order denying rehearing is reprinted as Appendix B.

JURISDICTION

That on or about September 7, 1963, appellant Clarence H. McKinley executed and filed his application with the appellee Board for a certificate of qualification as a funeral director on a form prescribed by said Board, accompanied by the appropriate fee, a copy of which application is reprinted as Appendix C. That on the 7th day of November, 1963, said Board by notice in writing returned said application and failed, neglected and refused to consider the same upon the grounds that said application was not in proper form as required under §32-1331 A.R.S., and further refused to undertake or conduct an investigation or hearing required under the applicable statutes of the State of Arizona, including Article III, Section 4, of the Rules and Regulations of said Board, all as appears from a copy of said notice reprinted as Appendix D.

As a result of this action of the appellees, Clarence H. McKinley instituted and prosecuted a petition for a Writ of Mandamus directed to said Board, the same being Cause No. 156678 in the Superior Court of the State of Arizona, in and for the County of Maricopa, which said petition was by order of said Court denied on the 24th day of January, 1964, and further, the state statutes were held constitutional.

On February 3, 1964, appellant Clarence H. McKinley filed notice and application for a Writ of Certiorari or in the alternative Writ of Mandamus in the Arizona Supreme Court.

On February 11, 1964 the Arizona Supreme Court, after considering oral argument and briefs, issued its order that an original Writ of Certiorari should issue, reprinted as Appendix E.

On June 18, 1964, the Arizona Supreme Court affirmed the decision of the Arizona State Board of Funeral Directors and Embalmers.

On October 20, 1964, the Arizona Supreme Court with two Justices dissenting, denied rehearing, on that same date as reflecting by minute entry.

On January 18, 1965, Clarence H. McKinley filed notice of appeal in the Arizona Supreme Court to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review the judgment by appeal is conferred by 28 U.S.C. §1257 (2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Liggett Co. v. Baldrige, 278 U.S. 105, 49 Sup. Ct. 57, 73 L. Ed. 204; *Lochner v. New York,* 198 U.S. 45, 25 Sup.Ct. 539, 49 L.Ed. 937; *Thornhill v. State of Alabama,* 60 Sup.Ct. 736, 310 U.S. 88, 84 L.Ed. 1093,; *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540, 46 L.Ed. 679; *Smith v. Texas,* 233 U.S. 630, 58 L.Ed. 1129.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Arizona Revised Statutes, 1956, §32-1330. Qualifications of funeral director; application; fee.

"A. 2. Has been, for not less than one year previous to the filing of his application, a qualified practicing embalmer

associated with a qualified practicing funeral director."

§32-1331. Investigation of applicant for funeral director's certificate, issuance of certificate.

"A. Upon receipt of an application for a certificate of qualification as a funeral director in proper form and containing the information prescribed by §32-1330, the board shall have an investigation made of the applicant's character, ability and experience, and, if application is by or in behalf of a partnership or other organization, a similar investigation shall be made of its officers and members."

§32-1337. (Surviving spouse — special permit).

"A. When a qualified funeral director dies leaving an established funeral business, the surviving spouse may make application for examination as a funeral director. The application shall be in writing, under oath, on a form prescribed by the board, and shall state the facts in the case. The board may certify the applicant for the examination prescribed for funeral directors, in which event the requirements with respect to prior experience as a qualified practicing embalmer and association with a qualified practicing funeral director shall be waived. The qualification examination fee shall be five dollars in this instance."

QUESTION PRESENTED

The Supreme Court of Arizona has construed Arizona Revised Statutes §§32-1330.A(2), 32-1331.A, and 32-1337 as not violative of the Fourteenth Amendment of the United States Constitution, even though this statute precludes certain persons from engaging in the business of funeral directing while other favored individuals are exempt from compliance.

The basic question presented is:

Whether Arizona Revised Statutes §§ 32-1330.A(2), 32-1331.A, and 32-1337, as so construed are invalid as being repugnant to and in violation of that portion of the Fourteenth

Amendment Section 1., of the United States Constitution which states:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The foregoing basic question was intended to include every subsidiary question fairly set forth therein including, but not limited to:

1. Whether the competitive business of funeral directing can be restricted by A.R.S. §32-1330, when such requirements do not bear a close resemblance to the public welfare, since Arizona already has stringent and adequate requirements closely guarded by the Arizona State Department of Health, and the Embalmers Board and A.R.S. §32-1361 which prohibits embalming a dead human body except by a qualified practicing embalmer or by a registered apprentice under the supervision of a qualified embalmer.
2. Whether the arbitrary and capricious aspects of A.R.S. §32-1330, §32-1331 and §32-1337 are inseparable and inextricably interwoven, providing special immunities to "a privileged class" are repugnant to the United States Constitution and are of such import that the entire statute must be adjudged be unconstitutional as denying the equal protection of the United States Constitution.
3. Whether the business of funeral directing can be thwarted under the guise of protecting the public interest by legislative action is arbitrary and without substantial reasonable relation to the end purportedly sought to be protected.
4. Whether *class legislation* can remain, when it favors particular individuals and deprives others of a license under the guise of economic hardship to "one-man operations in small communities in Arizona."

5. Whether a statute which discriminates between members of the same business in recognizing that the public health, safety and welfare are not in jeopardy by allowing spouses of deceased funeral directors and legal representatives of his or her estate (A.R.S. §32-1337A.) to operate a funeral establishment without adhering to the requirements of A.R.S. §32-1330 and §32-1331, by merely hiring an embalmer as approved in Subsection (c) of A.R.S. §32-1337, precludes your appellant whom the court conceded possessed satisfactory prerequisites for over 25 years in California and other states to manage his own establishment.

STATEMENT OF THE CASE

Arizona has had the statutes relating to funeral directors in force since 1945 (Section 38 of Laws 1945, chapter 36, declared an emergency. Approved March 7, 1945.) This section repealed Article 10, Section 67, *Arizona Code of 1939* entitled *"Embalming"* which had been in force and effect since 1909, which former section was comparative in legislation with some thirty-five (35) other states prior to its abolition in 1945; compare the *Arizona Code Annoted* 1939 Vol. 5 at page 282 entitled *Comparative Legislation.*

From 1909 to 1945 Arizona existed under an embalmers code which was governed and supplemented by the still present statutes of the Arizona State Board of Public Health. In 1945 the promulgation of the new Funeral Directors statutes, (which also encompassed statutes affecting Embalmers), recognized *"Funeral Directing"* as a *business,* see A.R.S. §32-1301 (7).

On September 7, 1963, appellant Clarence H. McKinley executed and filed his application for funeral director of his own establishment, to wit: Mortensen-Kings Mortuary, located in Phoenix, Arizona. This application was rejected without consideration because it did not reveal that he was a licensed embalmer and had practiced as an apprentice funeral director at least one

year before filing said application. (Appendix C; T.R. 10)

On 24 January, 1964, the Superior Court of Arizona in and for the County of Maricopa quashed appellant McKinley's alternative Writ of Mandamus, basing its opinion on the following reasoning:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Arizona Revised Statutes, §32-1330 and §32-1331 are constitutional."

Clarence McKinley then on February 3, 1964, filed notice and application for an original Writ of Certiorari or in the alternative a Writ of Mandamus in the Arizona Supreme Court. On February 11, 1964, after oral arguments and briefs submitted, the Supreme Court ordered that an original Writ of Certiorari should issue.

On June 18, 1964 the Court then concluded that the Writ heretofore issued should not be made permanent, but the decision of the Funeral Directors Board should be affirmed, based on the following grounds:

1. *Class legislation* is permissible when the state legislature seeks to protect "some" residents for economic reasons.
2. That *even* if A.R.S. §32-1330 and §32-1331 and §32-1337 do grant special decendable immunities, they are separable and not interwoven.
3. That the competitive business of funeral directing bears a close resemblance to the public and economic welfare of "some privileged state residents" — this is deemed solely within the legislative province.
4. None of the foregoing principles violate the equal protection clause of the Fourteenth Amendment.

The Court's conclusion is that the state statutes are neither repugnant nor inconsistent with the Federal Constitution. (Appendix A).

The two (2) dissenting Justices on rehearing did not write an opinion.

HOW THE FEDERAL QUESTION WAS PRESENTED

Clarence H. McKinley requested the Superior Court and the Supreme Court of the State of Arizona to declare, among other things, that Arizona Revised Statutes §32-1330, §32-1331 and §32-1337 to be repugnant to and in violation of the Fourteenth Amendment of the United States Constitution, but not limited to the following:

1. The fact that appellant's application was in all respects executed in due and proper form, save and except for the provision that applicant was and is not a graduate of, nor did he attend, a course of instruction at a college of mortuary science approved by said Board or at all. That such requirement bears no reasonable or substantial relation to the qualifications of a funeral director in that §32-1323 through §32-1325 A.R.S. provide for the licensing of embalmers and such licensed embalmers are required by law (§32-1361 A.R.S.) to be exclusively employed in the preparation and embalming of dead human bodies within the State of Arizona.
2. That §32-1330 A.R.S. through §32-1337 A.R.S. are unconstitutional and void in that said statutes constitute an arbitrary abridgment and restriction upon, and deprive appellant of, equal privileges and immunities and fundamental liberties guaranteed under Article II, Section 4 of the Constitution of the State of Arizona and the Fourteenth Amendment of the Constitution of the United States of America.
3. That in refusing to consider appellant's application as aforesaid and in further refusing to conduct an investigation and to hold a hearing upon said application as required by §32-1331 A.R.S., your appellant was denied due process of law and that said Board acted in excess of its jurisdiction and without jurisdiction in so doing; that further appellant has been and is denied equal protection

of the law and equal privileges and immunities in that under and pursuant to §32-1337 A.R.S. the requirement set forth in §32-1330 (A.2) to the effect that an applicant for a certificate of qualification as a funeral director be a "qualified practicing embalmer" is waived; that in substance and effect the existing law does not require every funeral director to be a qualfied licensed embalmer and for that reason both §32-1330 A.R.S. and §32-1337 A.R.S. is class legislation granting special privileges and immunities to a certain class while discriminating as to others, including appellant herein.

4. That by its notice in refusing to consider appellant's application dated November 7, 1963, and in failing to conduct an investigation and to hold a hearing upon appellant's qualifications, your appellant has been denied due process and has been and will be deprived of his gainful occupation and livelihood which his education, training and experience best suit him to pursue.

5. That should appellant undertake to pursue his business or profession without a certificate of qualification as a funeral director as provided in the statutes hereinabove referred to, appellant will be subject to prosecution for violation of the criminal statutes of the State of Arizona, and may be subject to penalties, fines, forfeitures and/or imprisonment under §32-1368, A.R.S.

THE FEDERAL QUESTION IS SUBSTANTIAL

The issues presented are of first impression in this Court, in that the majority of the members of the Arizona Supreme Court have upheld the constitutionality of Arizona Revised Statutes §32-1330, §32-1331, and §32-1337, requiring the ownership of funeral establishments by a particular class as not violating the equal protection clause of the United States Constitution. The Arizona Court readily recognizes that the occupation of funeral directing is a *Business* (A.R.S. §32-1331.6). Therefore, it is fun-

damental that appellant's business is a property right entitled to protection against state legislation in controvention of the Federal Constitution; compare *Liggett Co. v. Baldrige*, 278 U.S. 105, 49 Sup. Ct. 57,73 L.Ed. 204.

The issue in the main boils down to whether the statutes have a real and substantial relationship to guarding the public welfare, or are they an arbitrary invasion of appellant's property rights; compare: *Lochner v. New York*, 198 U.S. 45,57, 25 Sup.Ct. 539, 543, 49 L.Ed. 937:

> "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person, and in his power to contract in relation to his own labor."

The occupation of owning a funeral establishment is not a profession, but a mere business; see *Babcock v. Laidlaw*, 113 N.J. 318, 166 Atl. 632, at 633:

> *"Undertaking as commonly carried on, is not a profession; it is a business or trade.* O'Reilly v. Erlanger, 108 App.Div. 318, 95 N.Y.S. 760; Bond v. Cooke, 237 App.Div. 229, 262 N.Y.S. 199.
>
> "The Licensing Act (chapter 156, P.L. 1927 [Comp. St. Supp. §§ 225-20, 225-21]) is entitled *An Act to regulate the business of dealing with dead human bodies, including their preparation, preservation and disposal and the business of funeral directing, embalming and undertaking and to license those engaged in the business of funeral directing, undertaking, embalming and the preparation and preservation and disposal of dead human bodies and to punish persons violating the provisions thereof.' The expressions 'business of embalming' and 'business of funeral director'* are

used throughout the act, clearly indicating that, in the mind of the legislature, *the occupation in question is a business* rather than a profession." (Emphasis supplied)

This same premise has been recognized in the case of *State v. Winneshiek Co-Op. Burial Ass'n.* 237 Iowa 556, 22 N.W.2d 800, 165 A.L.R. 1092, compare:

". . . Funeral director and mortician certainly suggest a business rather than one of the learned professions. In *Building Com'r of Town of Brookline v. McManus,* 263 Mass. 270, 160 N.E. 887, the Supreme Judicial Court of Massachusetts stated:

"Undertaking, as commonly carried on, is not a profession; it is a business or occupation. It has been held that the working tools of an undertaker are not professional instruments. (citing cases)"

See also *Wyeth v. Board of Health of Cambridge,* 200 Mass. 474, 86 N.E. 925, 23 L.R.A. (N.S.) 147, 128 Am.St.Rep. 439.

The competitive business of funeral directing cannot be restricted when such requirements do not bear a close resemblance to the public welfare, since Arizona already has stringent and adequate requirements closely guarded by the Arizona State Department of Health, and the Embalmers Board.

The landmark case of *Liggett Co. v. Baldrige,* supra, emphatically enunciates this principle; compare at page 208 (L.Ed.):

* * * "Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines, is amply safeguarded.

"The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership.* It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, under the guise of protecting the public, arbitrarily interfere with pri-

vate business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (citing cases).

We are at a loss to understand the Arizona Court's position since most of its decision is embellished with dissertations regarding "embalming", of which appellant has no desire to become. The Arizona Court then seeks to strengthen its ruling on this point by citing *Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 Pac. 923; we have no quarrel with the rule of law in the above mentioned "zoning case", however, its analogy escapes us!

If it could be segregated from its interrelated whole, the most fallacious portion of the qualifications for funeral directors, is that sub-section issuing special immunities (A.R.S. §32-1337). These statutory provisions all must be read in pari materia since their import is inseparable and inextricably interwoven, admittedly to provide special immunities to a privileged class (Tr. 38-43). Compare *People v. Harrison*, 156, N.Y.S. 679, 114 N.E.1076, wherein the New York Supreme Court denounced similar legislation:

> *"I am of opinion that no prosecution for engaging in the business of an undertaker without a license can be sustained under the provisions of this section, for if the provisions with respect to the apprenticeship are unconstitutional, * * * for that would be an unjust discrimination, and it is manifest that all provisions of the section are connected and dependent upon one another, and were designed to accomplish the purpose of requiring all engaging in business as undertakers to procure licenses, and therefore, some of the provisions being unconstitutional, the entire enactment must fall. (citing cases and authorities)."*

See also *Conolly v. Union Sewer Pipe Co.*, 184 U.S.540, 46 L.Ed. 679.

At one point, the Arizona Court unqualifyingly states that the qualifications of embalmer are essential in order to own your

own funeral home and conduct a funeral service. This pronouncement is supported by a lengthy discussion regarding the necessity of embalming bodies in the great plains area of the western states, more specifically, the southern part of Arizona wherein it is warm in the summertime. We readily concede that the Court can take judicial notice of the climate. Then the Arizona Court changes course with the unprecedented statement (at page 272 of 393 P.2d) *"that the legislative intent may well be to protect establishments in small communities."* This premise is also built on a foundation of clay, since A.R.S. §32-1361 prohibits embalming except by a qualified embalmer or his apprentice, coupled with the stringent rules of the administrative Board and the State Board of Health, all of which adequately protect the public.

The strained position defended by the Court can more easily be pointed out without further comment by a casual perusal of the transcript of record whereby one of the appellees himself, after much vascillation and counterpointing, readily discloses the inequities of the Arizona funeral director statutes; compare at page 38 T.R.:

> "Q. Now, Mr. Clegg, you've told us first you had to be a licensed embalmer under the Statute to become a funeral director. Now we have reviewed some 11 or 12 names of people that obviously do not have embalmer's licenses. Yes or no, please, sir?
>
> A. According to that record, sir that's true.
>
> Q. Some of these people you know of your own knowledge not to have embalmer's licenses?
>
> A. That's right.
>
> Q. Some of these are men and women by their names, is that not correct?
>
> A. That's right, sir.
>
> Q. Can I become a funeral director in the State of Arizona without becoming an embalmer, meaning Mr. Brewer as a lawyer, please, sir?

A. I would say no.

Q. Isn't it true that you have a Statute stating that spouses of deceased funeral directors can obtain a funeral director's license without becoming an emblamer and for filling the apprenticeship under the embalmer portions of the Code?

A. That's right, sir; I think that is certainly an important area because —

Q. — fine; now, you have said "Yes;" let me continue, please, sir. Let us presume, Mr. Clegg, that someday you obtain your funeral director; that unfortunately you passed away and Mrs. Clegg inurs to the benefit of your license. Let's assume that I, Mr. Brewer, as a lawyer have the good fortune of marrying Mrs. Clegg after your death and after she obtains this license. Then Mrs. Clegg dies. Am I not the spouse of a licensed holder, please?

A. I would say no because the license would not be transferable to you. There is nothing in the law that says it can be.

Q. There's nothing in it that says that it can't be either, is there?

A. The only reason is to protect the assets of the estate.

Q. Don't tell me the legal reason, it is for the Judge. Let's go a step further; if there is nothing that says it cannot be done let us presume after Mr. Clegg has passed away and she then becomes Mrs. Brewer and she passes away and on my death bed, suppose I marry a sixteen year old girl and die two days later, does she inure to your original permit?

A. I am not an attorney, sir, and don't entangle me. I feel that it's an unfair question and I do not know the answer.

Q. Mr. Clegg, could a bank become a funeral director?

A. I think that's rather ridiculous; I would say no.

Q. What about a veterinarian?

A. No.

Q. How about a butcher?

A. I think this is certainly a ridiculous question.

Q. Is it not true that A.R.S. 32-1337 (B) says the legal representative of a deceased funeral director can be a funeral director for nine months if he has a qualified embalmer working for him?

A. That is right.

Q. Then if you died and your brother was a butcher or a veterinarian or a lawyer he could be the legal representative of your license, is that correct, sir?

A. Under the supervision of the Board if he hired a licensed man and the Board would have jurisdiction over that licensed man that it was necessary to hire.

Q. They have jurisdiction over the licensed man, isn't that the purpose of the Board?

A. That's why it is necessary to have limits so there is some jurisdiction over him the same as you have a license.

Q. Yes. Now, if I were your legal representative I could become a funeral director under the State Statue as long as I had a licensed embalmer working for me, is that correct?

A. For nine months.

Q. For nine months?

A. To give them an opportunity to settle the estate and save the assets that that man may have worked for all of his life.

Q. And in nine months I might ruin the assets and a lot of people, too, according to your prior testimony?

A. I can't answer that.

Q. Of course because isn't it true you are a Board Member?

A. I don't understand how you would manage it, you may.

Q. I am being surreptitious; your Board, Mr. Clegg, isn't that true that your Board requires, as does the Statute, that a licensed embalmer do all of the embalming while the legal representative manages the establishment?

A. That's right.

Q. All right. What about the spouse? Suppose Mrs. Clegg had the misfortune of passing away; she would also need a licensed embalmer if she had her own establishment, is that correct sir?

A. That's correct.

Q. Well, we have a class of two types of people now, legal representatives, which under the law can be a corporation or a bank or a friend or anybody else, then we have spouses. Now, a man or a woman could be a spouse. Why can't Clarence McKinley become a spouse or a legal representative and obtain a license that way, please, sir?

A. See —

Q. Well, that's a good question. If he were one of those two he could obtain a license, is that correct, as a funeral director?

A. *I won't answer because he isn't and so it is not a true statement.*

Q. I'm not asking for your demise, please, sir, but using it as an example if Mr. Clarence McKinley married Mrs. Clegg after your demise and she then passed away he could be the licensed funeral director, correct?

A. Will you state that again, please?

Q. If you passed away and Mrs. Clegg then married Clarence McKinley —

A. — let's omit Mrs. Clegg and use Mrs. Jones; I don't care for that particularly.

Q. I will withdraw it please, sir. I'm sorry. Any funeral director who passes away and whose wife inures to the benefit of his license and later on Mr. McKinley marries her and then she passes away, isn't it true that Mr. McKinley is then a licensed funeral director?

MR. HAGGERTY: Objection as a legal conclusion. He's not qualified to state this opinion.

WITNESS: There is nothing in the Statute that says so to my knowledge.

Q. And there is nothing in the Statute that says that, is that true?

A. To my knowledge I don't know about it."

This Court has heretofore denounced similar attempts to thwart citizens from exercising their birthright; *Thornhill v. State of Alabama*, 60 S.Ct. 736, 310 U.S. 88, 84 L.Ed. 1093, at 1099:

"There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. (citing cases) The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system."

* * *

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near v. Minnesota, 283 US 697,713, 75 L ed 1357,1366, 51 S Ct 625. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. Lovell v. Griffin, 303 U.S. 444, 82 L ed 949, 58 S. Ct. 666; Hague v. Committee for Industrial Organization, 307 US 496, 83 L ed 1423, 59 S Ct 954. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory en-

forcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

The Arizona Court goes far in evading its inherent duty to safeguard the rights of its citizens in vascillating from the theory of protection of the public welfare to an entirely new premise at page 273 (393 P.2d) of its opinion:

"The legislature could have been of the view that the qualifications of an embalmer were desirable for a funeral director but in weighing the economic hardship which could occur decided that the public interest was better served by creating the exceptions stated in A.R.S. §32-1337."

The foregoing analogy relied upon by the Arizona court relating to economic hardships is apparent to all that a monopoly has developed in the business of funeral directing, which precise gimmick was held unconstitutional in Maryland as early as 1911. Compare: *State v. Rice*, 115 Md. 317, 80 Atl. 1026.

The Arizona opinion seeks solace from the lone 1940 Florida decision of *State Board of Funeral Directors v. Cooksey*, 147 Fla. 337, 3 S.2nd 502, which is hardly analogous since that case turned on the misconduct of a funeral director for slandering a fellow funeral director and for switching caskets on bodies to be transported out of state.

It is noteworthy that the recent Illinois case of *Gholson v Engle*, (1956), 9 Ill.2d 454, 138 N.E.2d 508, denounces the Florida case, on page 511 thereof:

" . . . The disputed issue is whether the interest of the public carries further and justifies the compulsory partial merger of their activities by requiring that a funeral director have the knowledge, skill and training of an embalmer before he can direct a funeral. In our opinion it does not.

"While the question is one of first impression here, many other courts have considered the validity of similar statutes

or administrative regulations, and, with one exception, they have been held invalid. (citing cases) The exception is a Florida decision. *State Board of Funeral Directors and Embalmers for Florida v. Cooksey*, 147 Fla. 337, 3 So.2d 302, 304. That was a proceeding to revoke Cooksey's license as a funeral director for failing to transport a body in a casket which conformed to the sample submitted, for making false representations, and for other misconduct."

The Arizona Supreme Court in years gone by has unceasingly held that an entire statute should be declared invalid where the constitutional provisions are so connected and interdependent in subject matter. Compare:

City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72; *Hudson v. Kelly*, 76 Ariz. 255, 263 P.2d 362; *Millett v. Fröhmiller*, 66 Ariz. 339, 188 P.2d 457.

It is noteworthy that exactly four days after the Superior Court of the State of Arizona held these statutes at bar to be consitutional, the very same counsel for the appellees entered an opinion on behalf of the Attorney General of the State of Arizona holding that sections of the Arizona Funeral Directors code *are invalid*; we direct this Court's attention to:

Opinion No. 64-6 R-64 (by Robert W. Pickrell, the Attorney General dated January 28, 1964).

wherein it is stated:

"This office by an opinion issued in 1960, No. 61-3, clearly held that the State Board of Funeral Directors and Embalmers was not empowered to require an examination of applicants for a funeral director's license. It appears that the reasoning of that position is correct and we affirm the opinion. It has been suggested that an examination may be given as part of the investigation provided under A.R.S. §32-1331, but it is our belief that this investigation and examination cannot be used as a subterfuge to set up a substantial and basic requirement for licensing not contained in the statute."

The Arizona court seeks to rationalize the violation of petitioner's constitutional rights by substituting the theory of public welfare and safety, citing an obscure section of the context set forth in 89 A.L.R. 2d 1338, entitled *Validity and Construction of Statute, Ordinance, and other Regulation in Relation to Funeral Directors and Embalmers.*

The most important section of this comprehensive annotation was not mentioned; however, it is exactly on all fours with the instant action now before this Court, and we respecfully direct the Court to page 1369 §24, entitled:

The requirement that the undertaker is licensed as an embalmer:

> *"The weight of authority is to the effect that public health considerations do not justify statutes or administrative regulations requiring applicants for a license as undertakers or funeral directors to have an embalmer's certificate or license, and such a requirement is invalid.*
>
> "Colorado. *Cleere v. Bullock* (1961) 146 Colo. 284, 361 P.2d. 616.
>
> "Illinois. *Gholson v. Engle* (1956) 9 111.2d 454, 138 N.E. 2d. 508.
>
> "Maryland. *State v. Rice* (1911) 115 Md. 317, 80 A. 1026, 36 L.R.A. N.S. 344.
>
> "Massachusetts. *Wyeth v. Board of Health (Wyeth v. Thomas)* (1909) 200 Mass. 474, 86 N.E. 925, 23 L.R.A. N.S. 147.
>
> "New York. *People v. Ringe* (1910) 197 N.Y. 143, 90 N. E. 451, 27 L.R.A. N.S. 528.
>
> "Wisconsin. *State ex rel. Kempinger v. Whyte* (1922) 177 Wis. 541, 188 N.W. 607, 23 A.L.R. 67." (Emphasis Supplied)

Before the existence of *Cleere v. Bullock*, supra, or *Gholson v. Engle*, supra, the foregoing rule of law was precisely stated and

supported by the older cases noted above, compare *Cooley's Constitutional Limitations*, Eighth Ed. Vol. 2 at page 1331.

CONCLUSION

Not often has this Court had the opportunity to strike down such unreasonable and arbitrary legislation designed to limit a lawful occupation to a favored class and to deprive others equally well fitted to so engage therein. The invasion of the rights of persons and property under the guise of a police regulation should not be allowed.

Arizona Revised Statutes §§32-1330, 32-1331, and 32-1337 were obviously not passed for the sole purpose of protecting the welfare of the community, but openly to reserve a monopoly to a favored class. Equal protection of the laws is an absolute right and is a command which the State of Arizona must respect since the preservation of this right is the purpose of the Constitution.

Appellant submits the entire act is unconstitutional under the Fourteenth Amendment.

Respectfully submitted,

MARK WILMER and CHARLES M. BREWER

By _____

MARK WILMER
Attorneys for Appellant
400 Security Building
Phoenix, Arizona

Appendix A

THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

CLARENCE H. McKINLEY,
Petitioner,

v.

CHRIS A. REILLY, C. STANLEY CLEGG and HUGH DUGAN, as members of the Arizona State Board of Funeral Directors and Embalmers,
Respondents.

No. 8230

ORIGINAL PROCEEDING IN CERTIORARI
DECISION OF ARIZONA STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS AFFIRMED

Charles M. Brewer, Phoenix,
Attorney for Petitioner,

Robert W. Pickrell, The Attorney General,
Philip M. Haggerty, Assistant Attorney General,
John Madden, Special Assistant and
John S. Schaper, Special Assistant, Phoenix
Attorneys for Respondents.

STRUCKMEYER, Justice.

This action was commenced in this Court as an original petition for certiorari, article 6, section 5, Arizona Constitution, as amended 1960, and Rule 1 (A and B), Rules of Supreme Court, to

examine a decision of the Arizona State Board of Funeral Directors and Embalmers denying petitioner a license to act as a funeral director. Jurisdiction was accepted on the authority of Bennett v. Arizona State Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166, and Findlay v. Board of Sup'rs. of County of Mohave, 72 Ariz. 58, 230 P.2d 526, 24 A.L.R.2d 841.

Petitioner, Clarence H. McKinley, filed an application with the Arizona State Board of Funeral Directors and Embalmers for a certificate of qualification as a funeral director on the form prescribed by the Board. The Board returned McKinley's application accompanied by a letter stating that the application was not in the form required by A.R.S. § 32-1331. That section requires the Board to investigate an applicant for a funeral director's certificate if the form submitted contains the information prescribed by A.R.S. § 32-1330.

A.R.S. § 32-1330 sets out qualifications for a funeral director, requiring that an applicant shall set forth that he:

> "A. 2. Has been, for not less than one year previous to the filing of his application, a qualified practicing embalmer associated with a qualified practicing funeral director."

In his application, petitioner stated that he was not a qualified embalmer. It is conceded that petitioner has been a funeral director for a period of twenty-five years elsewhere than in Arizona, including the State of California.

On December 2, 1963, petitioner applied for a writ of mandamus in the Superior Court of Maricopa County asking that the Board be directed to issue a funeral director's certificate and in the alternative for a declaratory judgment that A.R.S. §§ 32-1330 and 32-1331 be found unconstitutional. The Superior Court of Maricopa County refused to issue the writ and further declared that A.R.S. §§ 32-1330 and 32-1331 were constitutional.

Petitioned here urges that A.R.S. §§ 32-1330 and 32-1331 deprive the petitioner of rights guaranteed to him under the Constitution of Arizona, article 2, section 4, and the Fourteenth

Amendment to the United States Constitution, imposing an unreasonable requirement in that to be certificated as a funeral director one must be a licensed embalmer. It is petitioner's argument that the business of funeral directing is not so closely aligned with the business of embalming that a funeral director should be required to be an embalmer, that consequently it is an arbitrary exercise of police power for the Arizona legislature to require a funeral director to have the skill and knowledge of an embalmer.

It is well established that both undertaking and embalming are so affected with the public interest that they are subject to regulation and control by the State. In City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 Pac. 923, where, under the authority of its City Charter, Tucson passed an ordinance regulating the location of mortuaries, we said:

> "It is generally conceded that mortuaries, to use the modern term applied to undertaking and embalming establishments, are subject to reasonable police regulation * * * as to the manner in which they are conducted." 34 Ariz. 499, 500.

It is now undisputed that the undertaking and embalming business is one of a quasi public business closely related to health, welfare and public safety and is a business which, under the police power of the state, may be subject to regulation. See 89 A.L.R.2d 1338, annotation and cases cited, 1342-1343.

Some general principles of law need be emphasized. Every legislative act is presumed constitutional and every intendment is indulged in favor of an act's validity. Austin v. Campbell, 91 Ariz. 195, 370 P.2d 769. The police power of the State is the power vested in its legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties or without as shall be judged be good for the welfare of the state and its residents. Sweet v. Rechel, 159 U.S. 380, 40 L.Ed. 188, 16 S.Ct. 43. Neither the Federal nor the Arizona Constitutions require that the legislature act in a manner less than in the public interest merely because an individual's right is af-

fected by the passage of that particular statute.

In Edwards v. State Board of Barber Examiners, 72 Ariz. 108, 231 P.2d 450, we held that where an enactment bears any reasonable relationship to the end sought the courts may not substitute their judgment for the judgment of the legislature. We also said that the courts will acquiesce in the legislative determination of all matters of fact unless it is clearly erroneous, arbitrary and wholly unwarranted.

It is for the legislature to determine when a business or occupation, whether inherently or as the result of the manner in which it is conducted, is subject to restrictions. Courts are not concerned with the wisdom of legislative regulation, but examine only to determine if it runs contrary to constitutional guarantees or if it is otherwise arbitrary and unreasonable. We said in Francis v. Allen, 54 Ariz. 377, 96 P.2d 277:

> "There is business which is entirely legitimate ordinarily, but it may become, because of the manner in which it is carried on, a cause of such evils, vices and dangers as affect the safety, health, comfort or welfare of the public. When it has this effect, it is subject to regulation, or even to prohibition, by the state under its police powers, and in determining when the necessity for such regulation or prohibition arises, it will be presumed that the legislature knows the manner in which the business is carried on and believes that the necessity for regulation has arisen." 54 Ariz. 381, 382.

A. R. S. § 32-1301 defines "embalmer," "funeral directing" and "funeral director" as:

> " 'Embalmer' means a person engaged in the art of disinfecting or preserving dead human bodies and preparing them for transportation."
>
> " 'Funeral directing' means the business or profession, for profit, of disposing of dead human bodies or of maintaining a funeral establishment."
>
> " 'Funeral director' means a person engaged in funeral directing or in the management of a funeral establishment."

By A. R. S. § 32-1301, an embalmer is a person engaged in the art of disinfecting or preserving dead human bodies and preparing them for transportation. He is required, by A. R. S. § 32-1322, to be a graduate of a standard four-year high school course or its equivalent, be a graduate of a regular course of instruction in a college of embalming approved by the State Board of Funeral Directors and Embalmers, have two years practical training and instruction under a qualified practicing embalmer and have embalmed not less than fifty human bodies in the course thereof. The preparation for burial of the human remains involves proficiency in the fields of anatomy, chemistry, and bacteriology and the like.

The sciences of bacteriology and pathology and others allied with the prevention of the spread of infectious disease have advanced immeasurably during the past fifty years. Those who die from contagious and infectious disease may pass through the hands of an embalmer in preparation for disposal. A high degree of skill and knowledge in sanitation and hygiene must be possessed by an embalmer in order to prevent the transmission to or infection of others.

We take judicial notice that in the great plains area of the Western States and especially in Arizona the temperature during most of the year is such that dead bodies will rapidly decompose and disintegrate and that hence it is the common practice to embalm bodies in order to preserve them for services and later burial. The Arizona State Department of Health, by Rules and Regulations, Vital Statistics, Article 5, Part I, Regulation 3, recognizes the problem in forbidding the holding of any human body more than forty-eight hours after death unless it is embalmed or kept at a temperature below 32 degrees.

It is made a crime and unlawful by A. R. S. § 32-1368 for an embalmer, having knowledge of the fact sufficient to raise a suspicion of a crime related to the cause of death, to embalm a dead human without permission of a coroner. The State here has imposed upon the embalmers an obligation to recognize and understand matters of fact concerning causes of death and criminal

responsibility therefor.

The legislature has decided that embalming is not a business which should be entered into without substantial preparation nor is it one in which the uninformed or ill-trained should engage. There is, accordingly, an obvious relationship to the public health, safety and welfare which justifies that the State, in the exercise of the police power, demand rigid requirements of training and education in the public interest. Trinka Services, Inc. v. State Board of Mortuary Science, 40 N.J. Super 238, 122 A.2d 668.

By A.R.S. § 32-1321, those desiring to engage in the business of funeral directing must first procure from the State Board of Funeral Directors and Embalmers a certificate of qualification. A funeral director in Arizona is a person engaged in the management of a funeral establishment. The business of funeral directing is the business or profession of disposing of dead human bodies. A funeral director, therefore, is the person responsible for the supervision and operation of a business disposing dead human bodies. A funeral establishment may be, in small communities particularly, a "one-man operation." There is no statutory requirement that funeral directors hire embalmers. Under such circumstances the legislature might have believed that the funeral director, in order to properly carry on the business, should know how to embalm bodies along with the other special knowledge applicable to conducting the final interment of the deceased. In this situation the combination of the qualifications of the embalmer and funeral director would appear to be indispensable for the satisfactory performance of the business of funeral directing.

A funeral director, as the manager of more than a one-man operation, has of course the power to hire and fire employees including licensed embalmers and with it the right and necessarily the duty to direct that their activities conform to the standards customarily required in the profession. The Rules and Regulations of the Arizona State Board of Funeral Directors and Embalmers recognize this responsibility. By Article 7, Section O, of these rules, funeral establishments must be kept and maintained in a

clean and sanitary condition and all embalming tables, receptacles, instruments and other appliances must be thoroughly cleaned and disinfected immediately at the conclusion of each individual case. Other specific directions for sanitation are set forth in detail in Section O. While the obligation is imposed upon both funeral directors and embalmers, it is the management which has the ultimate responsibility.

Funeral directing partakes more of the characteristics of a profession than that of carrying on a commercial business activity. The public in dealing with funeral directors must, because of the nature of the business, repose absolute confidence in them for it has neither the means nor skill by which to judge whether the funeral directors have completely fulfilled their part of the bargain. Hence the public meets the funeral director on an unequal basis and if he is not competent to properly direct the work of his employees the public will suffer accordingly.

This ultimate responsibility of the funeral director demands that he determine whether the embalmer has performed his work properly. It is therefore reasonable that the funeral director be required to have the knowledge, qualifications and training of an embalmer. Accordingly, we are of the opinion that there is a reasonable basis which justifies the legislature in requiring that a funeral director have not less than one year's experience as a qualified practicing embalmer associated with a qualified practicing funeral director.

We recognize that there is authority holding contrary to the position we have taken here. Of these, two recent cases, because of the similarity of statutes, deserve comment. In Gholson v. Engle, 9 Ill.2d 454, 138 N.E.2d 508, the court stated:

> "The record does not, in our opinion, establish that the public health considerations justify the requirement that a funeral director be a licensed embalmer. The funeral director is concerned primarily with the amenities of the funeral service." 9 Ill.2d 460.

We think that the statute A.R.S. § 32-1330 is designed to compel the funeral director to be more concerned with the proper preparation of the human body for disposal and less concerned with the amenities of the funeral service. In Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616, the court stated:

> "It would appear that the only justification for requiring that a funeral director have all the qualifications of the embalmer is that he will be technically qualified to supervise the work of the embalmer. However, it is not shown that such supervision is appropriate or necessary." 146 Colo. 291.

In this we disagree with the Colorado court, being of the opinion that the legislature could believe that such supervision is appropriate and necessary.

We recognize that all may not agree that supervision and responsibility for the embalmer's acts are necessary for the proper discharge of a funeral director's duties. However, we are of the opinion that the principles of law applicable here compel us to hold the statute constitutional. It is the duty of the Court to uphold statutes rather than defeat them and to avoid making statutes invalid if possible. Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646; Peterson v. Sundt, 67 Ariz. 312; 195 P.2d 158; Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391; Hicks v. Krigbaum, 13 Ariz. 237, 108 Pac. 482. We do not concern ourselves with the wisdom of the legislative act but only whether there is any reasonable relationship between the statute and the end sought to be obtained. Edwards v. State Board of Barber Examiners, *supra*. In the instant case, the end sought to be attained is apparent. We cannot say that the relationship of the statute to that end is without reason. We agree in the conclusion reached by the Supreme Court of Florida in State Board of Funeral Directors, etc., v. Cooksey, 147 Fla. 337, 3 So.2d 502, modified on other grounds and rehearing denied 147 Fla. 788, 3 So.2d 508, adhered to on rehearing, 148 Fla. 271, 4 So.2d 253, wherein an identical requirement for funeral directors was held constitutional.

Petitioner argues that the unconstitutionality of subsection 2 of A.R.S. § 32-1330 is "exemplified by the ludicrous provision (A.R.S. § 32-1337) exempting spouses and legal representatives from obtaining embalmers' licenses in order to become funeral directors." A.R.S. § 32-1337 provides that when a qualified funeral director dies leaving an established business the surviving spouse may make application for examination as funeral director and the requirement with respect to prior experience as a qualified practicing embalmer shall be waived. A.R.S. § 32-1337 also provides that where there is no surviving spouse a special permit may be issued to the legal representative of the estate to carry on the business for a period not to exceed nine months so as to afford opportunity for termination, transfer or disposition of the business.

We first observe the general rule that only those who are injured by the unconstitutional provision of a statute may raise an objection as to its constitutionality. Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 84 P.2d 581. Assuming, but not deciding, that the exceptions carved out of A.R.S. § 32-1330 by § 32-1337 are arbitrary and without a reasonable basis, the favoritism on behalf of the widows and estates of deceased funeral directors would not be grounds for petitioner to attack the constitutionality of A.R.S. § 32-1330. Hence we do not reach the constitutionality of A.R.S. § 32-1337.

Petitioner argues, in effect, that the exceptions are a proof that the legislature did not consider the qualifications of an embalmer as necessary for a funeral director. We think that petitioner's conclusion does not necessarily follow. The legislature could have been of the view that the qualifications of an embalmer were desirable for a funeral director but in weighing the economic hardship which could occur decided that the public interest was better served by creating the exceptions stated in A.R.S. § 32-1337.

Decision of Arizona State Board of Funeral Directors and Embalmers is affirmed.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

JESSE A. UDALL, Chief Justice

LORNA LOCKWOOD, Vice Chief Justice

CHARLES C. BERNSTEIN, Justice

RENZ L. JENNINGS, Justice

Appendix B

B1

SUPREME COURT STATE OF ARIZONA

October 22, 1964

CLARENCE H. McKINLEY,
Petitioner,

v.

CHRIS A. REILLY, C. STANLEY CLEGG and HUGH DUGAN, as members of the Arizona State Board of Funeral Directors and Embalmers,
Respondents.

No. 8230

The following action was taken by the Supreme Court of the State of Arizona on October 20, 1964, in regard to the above-entitled cause:

"ORDER: Petitioner's Motion for Rehearing -

DENIED. Chief Justice Udall and Justice ernstein dissented."

SYLVIA HA INSON, Clerk
By LUCILLE BROOK ssistant Clerk

To—Charles M. Brewer
216 Luhrs Building
Phoenix, Arizona

John Madden *(Special Assistant Attorney General)*
316 Luhrs Building
Phoenix, Arizona

Appendix C

C1

APPLICATION

(For a Certificate of Qualification as a Funeral Director)

STATE OF ARIZONA
COUNTY OF MARICOPA } ss.

I, Clarence H. McKinley, the undersigned, hereby make application to:

THE ARIZONA STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS

for a Certificate of Qualification as a Funeral Director in accordance with State Law and Board Requirements.

And upon my oath do depose and say:

I am 59 years of age.

I was born on the 15th day of January, 1904.

I am a bona fide resident of Arizona, actually residing at 506 East Roanoke — Phoenix, Arizona.

I am of good moral character.

I am a graduate of a standard four year high school course, to-wit: (or equivalent)

Ashland High School, Ashland, Wisconsin — 1921

University of California, Los Angeles, Calif. — 1925.

I have been a graduate (or attended upon a course of instruction) at a college of mortuary science accredited with the national conference, to-wit:

NONE

I have for not less than one year previous to the filing of this application been associated with and have had training under a practicing funeral director licensed under the laws of Arizona, to-wit:

Leland M. Mortensen

Loren V. Guthrie

Any establishment in which I shall serve as a funeral director will conform in all regards with the applicable laws of Arizona and the Rules and Regulations of the Board.

In the event I am granted a certificate of qualification to practice the profession of funeral directing in the State of Arizona, I will obey and conform at all times in all regards with the applicable laws of Arizona and the Rules and Regulations of this Board pertaining to such profession and will at all times maintain the honor and dignity of said profession, and I fully understand that violation of any of said laws or rules, or breach of any of the ethics of said profession, will subject me to a suspension or revocation of said license.

Signed: Clarence H. McKinley

Subscribed and sworn to before me this 31st day of July, 1963.

Signed: Nancy A. Marx, Notary Public

My Commission expires:

I hereby state upon my honor that I have personally known C. H. McKinley, the signer of this application, for 10 years; that I am familiar with him and know his character, reputation, and professional attitudes, and that he is of good character and reputation and has good professional attitudes.

Signed: Ralph Marx

Address 7116 No. 8th Ave., Phx.

July 31, 1963

I hereby state upon my honor that I have personally known Clarence H. McKinley, the signer of this application, for over one year; that I am familiar with him and know his character, reputation and professional attitudes, and that he is of good character and reputation and has good professional attitudes.

Signed: Formott Anderson

Address 318 Portland, Phoenix, Arizona.

7/31, 1963.

D1

ARIZONA STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS

November 7, 1963

Mr. Clarence H. McKinley
506 East Roanoke
Phoenix, Arizona

Dear Mr. McKinley:

The Board acknowledges receipt on September 7, 1963, of your Application for a Certificate of Qualification as a Funeral Director and your application check in connection therewith, both of which are returned to you herein.

The Board, at a meeting today, is returning your application for the reason that same is not in proper form as is required under Section 32-1331, A.R.S., and for that reason the Board is not undertaking the investigation or the hearing that would be undertaken under Arizona law, including Article III, Section 4, of the Rules and Regulations of the Board. Were your application in proper form, the Board would, of course, undertake the investigation and the hearing contemplated by said laws.

Very truly yours,

ARIZONA STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS

By: C. Stanley Clegg, Secretary

E1

SUPREME COURT STATE OF ARIZONA

February 17, 1964

CLARENCE H. McKINLEY,
Petitioner,

v.

CHRIS A. REILLY, C. STANLEY CLEGG and HUGH DUGAN, as members of the Arizona State Board of Funeral Directors and Embalmers,
Respondents.

No. 8230

The following action was taken by the Supreme Court of the State of Arizona on February 11, 1964, in regard to the above-entitled cause:

"ORDER: That Writ of Certiorari issue; Respondents given 20 days to file additional authorities and memoranda; Petitioner given 5 days after receipt of response in which to reply."

SYLVIA HAWKINSON, Clerk
By Lucille Brooks, Assistant Clerk

To—Charles M. Brewer
216 Luhrs Building
Phoenix 3, Arizona

Attorney General — Attention: Philip M. Haggerty
Capitol Building
Phoenix, Arizona

[redacted]

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No. 1000

In the Supreme Court of the United States

OCTOBER TERM, 1964

CLARENCE H. McKINLEY,
Appellant,

vs.

CHRIS A. REILLY, C. STANLEY CLEGG, and HUGH DUGAN, as Members of the Arizona State Board of Funeral Directors and Embalmers,
Appellees.

On Appeal from the Supreme Court of Arizona

Appellees' Motion to Dismiss

PREFATORY NOTE

Appellant and appellees will generally be referred to herein as McKinley and the Board. References to the Jurisdictional Statement will be by "J.S."

MOTION TO DISMISS

Appellees, Chris A. Reilly, C. Stanley Clegg, and Hugh Dugan, as members of the Arizona State Board of Funeral Directors and Embalmers, hereby move that the appeal of Clarence H. McKinley in the above matter will be dismissed pursuant to Rule 16(b) of the Revised Rules of this Court

on the ground that the appeal does not present a substantial federal question.

ARGUMENT

I. Introduction.

The Jurisditional Statement presented to the Court is littered with various arguments, ideas and conclusions which cannot be legitimately derived from the record or from the Arizona Supreme Court opinion in this case. Unfortunately, the format of the Jurisdictional Statement is such that substance and speculation are often indistinguishable, and the one real question presented by the case is sometimes obscured by legal cliche's and discussion of spurious issues.

It is thus necessary in the presentation of the Argument supporting the Board's Motion to Dismiss that the questions on appeal be defined with some degree of clarity. This will be done by dividing the Argument into two parts, the first dealing with the "Equal Protection" phase of the case, and the second with the "Due Process" question.

A number of contentions made in the Jurisditional Statement will not be mentioned herein. This concession to brevity by the Board should not be construed as a concession of the accuracy of such assertions. Rather, it is the result of a conscious effort to present the Argument supporting the Motion to Dismiss with some degree of order.

II. The Non-Existent Equal Protection Issue.

Although the Jurisdictional Statement uses the term, "equal protection," in shotgun fashion, no question is presented in this case involving the Equal Protection of the Fourteenth Amendment. The equal protection aspect of the case arose from McKinley's argument that *A.R.S.* 32-1337, allowing the issuance of a funeral director's license

to the widow of a funeral director who is not an embalmer, or to an estate of a deceased funeral director (J.S. 4), is violative of the Fourteenth Amendment. The alleged unconstitutionality of the so-called "widow's exemption" was claimed by McKinley to support his position that *A.R.S.* 32-1330, requiring a funeral director to be a licensed embalmer (J.S. 4), was unconstitutional.

The Arizona Supreme Court disposed of McKinley's argument summarily:

> "Petitioner argues that the unconstitutionality of subsection 2 of A.R.S. § 32-1330 is exemplified by the ludicrous provision (A.R.S. § 32-1337) exempting spouses and legal representatives from obtaining embalmers' licenses in order to become funeral directors.'
>
> * * * * * * *
>
> "We first observe the general rule that only those who are injured by the unconstitutional provision of a statute may raise an objection as to its constitutionality. Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 84 P.2d 581. Assuming, but not deciding, that the exceptions carved out of A.R.S. § 32-1330 by § 32-1337 are arbitrary and without a reasonable basis, the favoritism on behalf of the widows and estates of deceased funeral directors would not be grounds for petitioner to attack the constitutionality of A.R.S. § 32-1330. *Hence we do not reach the constitutionality of A.R.S. § 32-1337.*" (J.S. A9) (Emphasis added)

Thus, the validity and effect of *A.R.S.* 32-1337 as an exception to *A.R.S.* 32-1330 was not decided by the Arizona Supreme Court, and cannot be considered by this Court under the rule of *Asbury Hospital v. Cass County, North Dakota*, 326 U.S. 207, 215, 66 S.Ct. 61, 90 L.Ed. 6 (1945):

> "* * * a constitutional question which turns on the construction and application of a statute which has neither been authoritatively construed nor applied by

the state courts may not appropriately be decided by this Court.".

Even if it is assumed in a vacuum that *A.R.S.* 32-1337 authorizes a special class of licensed funeral directors in violation of the Fourteenth Amendment, the removal of that section from Title 32, Chapter 12 of the Arizona Revised Statutes leaves a completely workable licensing and regulatory system. Under Arizona decisions,* the remaining portion of the Funeral Directors and Embalmers Law of 1945 would not be affected by the striking of *A.R.S.* 32-1337:

> "This court on numerous occasions has held that if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact. Gherna v. State, 16 Ariz. 344, 146 P. 494; Millett v. Frohmiller, 66 Ariz. 339, 188 P.2d 457." (*State v. Coursey*, 71 Ariz. 227, 225 P.2d 713, 719 (1950))

See also: *Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co.*, 28 Ariz. 22, 235 P. 137 (1925); *Ogelsby v. Pacific Finance Corporation*, 44 Ariz. 449, 38 P.2d 646 (1934). An invalid provision of an act relating to administrative agencies may be severed if the remaining portion of the act is workable. *State v. Marana Plantations*, 75 Ariz. 111, 252 P.2d 87 (1953).

An examination of Title 32, Chapter 12, Article 2 of the Arizona Revised Statutes makes it obvious that a complete act would remain if *A.R.S.* 32-1337 were lifted bodily out of the books. Mr. McKinley's status would be unchanged if

*The severability of a void section of a state law is determined under state law. *Dorchy v. State of Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686 (1924).

A.R.S. 32-1337 did not exist, or if it were never mentioned in this case. Whether *A.R.S.* 32-1337 does nor does not create a "privileged class" of funeral directors exempt from licensing requirements under *A.R.S.* 32-1330 is of no consequence in this action.

The issue as to the validity of *A.R.S.* 32-1337 is really nothing more than an abstract exercise by McKinley, the presentation of which must be rejected under the basic rule that this Court will not decide constitutional questions as to the validity of a state statute unless the necessity for such decision arises in the record. *Arkansas Fuel Oil Co. v. State of Louisiana,* 304 U.S. 197, 58 S.Ct. 832, 82 L.Ed. 1287 (1938). In essence, the Equal Protection "question" involving *A.R.S.* 32-1337 does not present a real case or controversy for determination under Article III, Section 2 of the Constitution.

III. The Significance of the Due Process Question.

It is unquestioned in this case by McKinley that persons providing funeral services are subject to regulation by the State of Arizona.* McKinley's complaints involve only the manner in which this regulation is accomplished, and more specifically, the validity of the following provision of *A.R.S.* 32-1330 under the Due Process clause of the Fourteenth Amendment:

---

*A contention that the State of Arizona cannot regulate such activities would be untenable. Every state in the United States has adopted legislation which in some way regulates persons providing funerals. The constitutionality of such regulation has been universally upheld in the state courts, and was again approved in this case by the Arizona Supreme Court. (J.S. A3, citing 89 A.L.R.2d 1338, 1342-1343) This court has, by implication if not directly, approved such regulation in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949).

"A. An applicant for a certificate of qualification as a funeral director shall set forth in his application that he is twenty-one years of age or over, a resident of this state and of good moral character. The application shall also show that the applicant:

. . . . . .

"2. Has been, for not less than one year previous to the filing of his application, a qualified practicing embalmer associated with a qualified practicing funeral director."

Reduced to its simplest terms, the question presented is whether the State of Arizona may, consistent with the Fourteenth Amendment, require a funeral director to be a licensed embalmer?

An understanding of this question necessarily requires some definitions of terms and explanation of the regulatory system adopted in Arizona. *A.R.S.* 32-1301 provides:

"In this chapter, unless the context otherwise requires:

. . . . . .

"6. 'Funeral directing' means the business or profession, for profit, of disposing of dead human bodies, or of maintaining a funeral establishment.

"7. 'Funeral director' means a person engaged in funeral directing or in the management of a funeral establishment."

As the Arizona Supreme Court stated in this case:

"A funeral director in Arizona is a person engaged in the management of a funeral establishment. The business of funeral directing is the business or profession of disposing of dead human bodies. A funeral director, therefore, is the person responsible for the supervision and operation of a business disposing dead human bodies." (J.S. A6)

Contrary to several statements made to this Court by McKinley (J.S. 9, 12), the Arizona Supreme Court did not rule that an *owner* of a funeral establishment must be a funeral director, nor do the licensing provisions of Arizona law operate with regard to ownership. All the law requires is that a person engaged in actual management of this establishment hold a funeral director's license, and that a funeral director who is, by definition, engaged in disposing of dead human bodies, hold an embalmer's license.

McKinley's attack on the licensing requirements of *A.R.S.* 32-1330 appeals to an outmoded concept of substantive due process of law with the contention that the State of Arizona has thwarted the business of funeral directing by legislation which is "arbitrary" and "without substantial reasonable relation" to the public interest. (J.S. 5) McKinley also expostulates that funeral directing is a competitive "business" rather than a "profession," which cannot be restricted by the State of Arizona when adequate protection of the public health is provided by other laws of the State. (J.S. 10-11)

These contentions are founded on cases such as *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928) (J.S. 3, 10, 11), which held that the State of Pennsylvania could not require every stockholder in a drug store to hold a pharmacist's license. The *Liggett* case was analysed in *Daniel v. Family Security Life Ins. Co.*, supra:

> "According to the majority in Liggett, 'A state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."' 278 U.S. at page 113, 49 S. Ct. at page 59, 73 L.Ed. 204. But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for

which respondents contend. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S.Ct. 251; where the cases are reviewed."

Other decisions from this Court relied upon by McKinley are similarly without contemporary significance.* The concept of Due Process for which those cases stood is primarily of only historical interest.

"* * * Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

* * * * * * * *

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (J.S. 3, 10) held that a state could not limit bakery employees to working a 60 hour week and a 10 hour day; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1901) (J.S. 3, 12) held a state anti-trust law unconstitutional, and was, for all practical purposes, overruled in *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) (J.S. 3, 17) involved a picketing and loitering law, and has no rational application to this case; *Smith v. Texas*, 233 U.S. 630, 34 S.Ct. 681, 58 L.Ed. 1129 (1914) (J.S. 3) ruled a state law requiring a railroad conductor to have two years experience on freight trains to be violative of the Fourteenth Amendment.

> appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'
>
> . . . . . .
>
> We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L.R.2d 1347 (1963)

The crux of McKinley's case is also founded on his disagreement with the statutory definitions of "funeral director" and "funeral directing" in *A.R.S.* 32-1301. Contrary to the statutory provision that funeral directing is a "business or profession," and the Arizona Supreme Court's statement that funeral directing is more a profession than a business (J.S. A7), McKinley asserts that funeral directing is a business in which he has an inherent right to engage. What McKinley ignores (and also concedes) is the fact that funeral directing, be it business, profession, vocation, or

industry, involves matters of public interest subject to public regulation. And, as stated in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955):

> "* * * the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a potential school of thought." (Citations omitted)

So, by admitting the power of the state to regulate funeral directing, McKinley negates his own claim that his "right" to practice funeral directing cannot be frustrated by the State of Arizona.

Concededly, the question presented by McKinley has been resolved in conflicting ways in different states. Four older cases cited by McKinley (J.S. 20) no longer have meaning in the states where they arose.* Two decisions, *Cleere v. Bullock*, 146 Colo. 284, 361 P.2d 616 (1961), and *Gholson v. Engle*, 9 Ill. 2d 454, 138 N.E.2d 508 (1956), were discussed and disapproved by the Arizona Supreme Court in this case. (J.S. A7-8) On the other side of the ledger are *Vaughn v. State Board*, 196 Va. 141, 82 S.E.2d 618 (1954), and *State*

Wyeth v. Thomas, 200 Mass. 474, 86 N.E. 925 (1909), has been nullified by Chap. 112, § 83, *Ann. Laws Mass.*; *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910) is no longer of meaning under *New York Health Law* § 3400; Art. 43, § 346 *Ann. Code Md.*, has in effect overruled *State v. Rice*, 115 Md. 317, 80 A. 1026 (1912); and *State v. Whyte*, 177 Wis. 541, 188 N.W. 607 (1922) is of no application in view of *Wis. Stat. Ann.*, § 156.045.

Board of Funeral Directors & Embalmers v. Cooksey, 147 Fla. 337, 3 So.2d 502 (1941).

The divergence of opinion among the states on the question presented does not make the question more substantial. Regulatory systems, definitions, and terminology involved vary greatly in different states. What is here involved is only the Arizona law, and its interpretation and application by the Arizona Supreme Court.

Disposition of the question on appeal is governed by the time honored concept of *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1888), as quoted in *Graves v. Minnesota*, 272 U.S. 425, 47 S.Ct. 122, 71 L.Ed. 331 (1926):

> "In the Dent case this court said: 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications must depend primarily upon the judgment of the state as to their necessity."

It is apparent on the face of the Jurisdictional Statement that McKinley's quarrel is with the wisdom and judgment of the Arizona Legislature. Under the *Dent* concept, as applied by this Court during the past twenty years, the

desirability or logic of the Arizona Legislature's prescribing minimum qualifications for persons engaged in funeral directing does not present a matter of such concern as to require the exercise of jurisdiction by this Court. See: *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961), and cases there cited.

CONCLUSION

The scope and tenor of the Jurisdictional Statement is exemplified by McKinley's concluding assertion that the entire act governing funeral directors and embalmers in Arizona is unconstitutional, a conclusion founded on continuous and redundant references to "class legislation," "special immunities," "arbitrary legislation," and "fundamental liberties." Nowhere are these fine words and sweeping claims translated into concrete application under the subsisting concepts of the Due Process clause. Nowhere does the Jurisdictional Statement explain McKinley's argument that there is no relationship between embalming and the work by a funeral director. Nowhere is the significance of this case demonstrated in the Jurisdictional Statement. McKinley's facade of generalized bravado does not obscure the fact that this is only another case in which an appellant is disputing the propriety of a licensing law which does not meet the appellant's standard of mediocrity.

Any illusion of significance engendered by McKinley's characterization of this case as a matter of first impression is readily dispelled by the opinion of the Arizona Supreme Court applying principles of constitutional law which are well-established by this Court. Any appeal to the Equal Protection clause is similarly without materiality in the absence of a legitimate equal protection issue. Any discus-

sion of the Due Process question can only lead to the conclusion that the question is of no more than passing interest.

In the absence of a substantial question involving the application of the Fourteenth Amendment in this case, it is urged that the appeal be dismissed.

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No. 1000

In The Supreme Court of the United States

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CLARENCE H. McKINLEY,

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v.

CHRIS A. REILLY, C. STANLEY CLEGG, and HUGH DUGAN, as Members of the Arizona State Board of Funeral Directors and Embalmers.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S REPLY BRIEF

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Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ARIZONA

APPELLANT'S REPLY BRIEF TO MOTION TO DISMISS

ARGUMENT

Appellees move to dismiss this appeal under Rule 16-1(b) of the Revised Rules of this Court, asserting the absence of a substantial federal question. Inherent in the motion is the admission that the particular statutes (§32-1330A.(2), 32-1331A., and 32-1337-2. A.R.S.) enacted by the legislature of the state (1) create and provide unequal privileges and immunities as among persons of the same class and locality within the state, and (2) deny the excluded class the equal protection of laws demanded by the Fourteenth Amendment of the United States Constitution.

Appellees' motion is presented in two parts, entitled: II. *the nonexistent equal protection issue,* and III. *the significance of the due process question.* Appellees' denomination of the issue in such manner is a purely arbitrary one, because the statutes complained of infringe upon the rights, privileges and liberties of the Appellant, all of which are guaranteed by the Fourteenth Amendment of the Federal Constitution. The cases cited in Appellant's brief and relied upon therein do not make a distinction between equal protection and due process, nor shall we. Therefore, this reply will be directed as nearly as possible to the points raised in the motion, and as nearly as possible to the order in which they appear therein.

Appellees' first contention, pages 2-3 of the motion, that "equal protection" arises from McKinley's argument that A.R.S. §32-1337 allowing the issuance of a funeral director's license to the widow of a funeral director who was not an embalmer, or to the estate of a deceased funeral director (J.S. 4) is incorrect. The substantial nature of the federal question presented here is amply demonstrated by the arguments and authorities in support thereof, found at pages 9 through 21 of appellant's opening brief and which require no reiteration.

Appellees' second contention at page 3 and top of page 4 of the motion to the effect that this appeal may not be heard for the reason that the Arizona Statute §32-1337, "has neither been authoritatively construed nor applied by the state courts" is further incorrect for the reason that the particular statutes sought to be invalidated, §32-1330A(2) and §32-1331A, A.R.S., were in fact adjudicated by the Arizona Supreme Court and their constitutionality upheld. It is true as appellees there point out that the state court did not reach the question of the constitutionality of §32-1337-2, A.R.S., but this section of the act was before the court only to demonstrate that the law was palpably discriminatory and that the pretended classifications set up in the statutes did not rest upon any reasonable basis, but were essentially arbitrary in character. This Court is not confined to the view of the facts or law taken by

the state court, but as stated:

> *"We may make an independent examination of the record." Doremus v. Board of Education,* 342 U.S. 429,434, 96 L.Ed. 475,479, 72 S.Ct. 394 (1952)

As a last argument on what is denominated the "equal protection aspects" of this appeal, appellees at page 3 and top of page 4 urge that the repugnance of the statutes at issue, to the Fourteenth Amendment, evidenced by the enactment of A.R.S. §32-1337, can be removed by applying the doctrine of severability.

In this regard we note that there is neither a saving nor severability clause in the statutes now before this Court. This Court has held that the failure to provide severability clearly evidences the legislative intent that the statute must be construed as an entirety. Compare:

> *"In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety — that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it." Carter v. Carter Coal Co., 298 U.S. 238,312, 80 L.Ed. 1160,1189, 56 S.Ct. 371.*

In *Utah Power and L. Co. v. Pfost,* 286 U.S. 165,184, 76 L.Ed. 1038,1048,1049, 52 S.Ct. 548, this Court further stated that in the absence of a saving clause that there was a clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. Moreover, this Court has held in *Skinner v. Oklahoma,* 316 U.S. 535,544, 86 L.Ed. 1655,1661, 62 S.Ct. 488, that even though an act has a severability clause, it will not endeavor to determine whether its application would solve the equal protection difficulty. The decision declares that the excision of a portion of a statute is a matter of state law, and that finding unconstitutionality in the sterilization act based upon a violation of the equal protection clause guaranteed by the Fourteenth Amendment, this Court reversed. The same rule is applicable here, since

the same reasons therefor are patent in the record.

Moving next to the argument commencing at page five of the motion, to the effect that Appellant's complaint involves only the validity of §32-1330, we submit that Appellees are again incorrect. Appellant maintains that insofar as §32-1330 A.R.S. compels an applicant for a certificate of qualification as a funeral director to have been

> *"for not less than one year previous to the filing of his application, a qualified practicing embalmer associated with a qualified practicing funeral director"*

denies equal protection of the law within the meaning of the Fourteenth Amendment. This is the plain import of every case in which the same or a similar statutory requirement was attacked in the various jurisdictions cited in Appellant's opening brief.

Reference is again made to the argument and cases on this point in Appellant's brief, pages 9 through 20 thereof. Appellees at page 10 and 11 of the Motion rely on *Vaughn v. State Board*, 196 Va. 141, 82 S.E.2d 618, and *State Board of Funeral Directors and Embalmers v. Cooksey*, 147 Fla. 337, 3 So.2d 502 as holding contra. With respect to Vaughn, supra, it should be pointed out that the Supreme Court of Appeals of Virginia found it necessary to distinguish the Virginia Act from the New York Act construed in *People v. Hurrison*, 156 N.Y.S. 679, 114 N.E. 1076, cited at page 12 of Appellant's opening brief, and *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451, cited at page 20 of Appellant's brief, as follows:

> *"These cases held that the business of undertaking and embalming is properly subject to regulations. However, it was held in People v. Ringe that the requirement of the New York Statute that an undertaker must also have an embalmer's license in order to engage in undertaking was an unreasonable requirement. The Virginia Act has no such provision . . ."*

Therefore, the holdings in *Vaughn* are totally invalid as authority on the questions presented for review because the Arizona Act is identical with that in New York, to-wit: that a funeral director be a licensed or qualified embalmer as a prerequisite:

Proceeding to Appellees' other remaining authority relied upon, to-wit: *Board v. Cooksey, supra,* we observe that this Florida case did not involve a direct attack upon the Florida Statute and further refer to a critique thereof by the Illinois Court found at pages 18 and 19 of Appellant's brief. It will thus appear that the Arizona opinion is clearly not based upon the weight of authority, nor as will be shown, on any reasonable relationship to public welfare, health or morals of the people of this state. Further, the Florida decision and an earlier Virginia decision, to-wit: *Walton v. Commonwealth,* 187 Va. 275, 46 S.E.2d 373, which was the predicate for *Vaughn,* supra, were criticized in *Cleere v. Bullock,* 361 P.2d 616,621 (Colo. 1961) (cited at page 20 of Appellant's brief) and were held not persuasive, the Colorado court stating:

> *"The better reasoned and majority viewpoint holds that a funeral director or undertaker cannot be compelled to have all of the qualifications of an embalmer. This rule recognizes the practical distinction between the two occupations. It differentiates the former on the basis that it demands general knowledge only and not the specialized skill which the embalmer must have."*

It is appellant's position that any regulation under the police power restricting, to the extent of prohibition, an ancient, honorable and necessary calling must justify its validity on the ground that it is essential to the public health, safety, convenience and morals*, and that §32-1330 and §32-1331, A.R.S., have no such sanction. In the appealed Arizona decision constitutionality is upheld upon the state court's conception of a legislative intent to protect the public welfare, health and morals on grounds, in substance, as follows:

1. Geographic and climatic conditions "temperature during most of the year is such that dead bodies will rapidly decompose and disintegrate and that hence it is common practice to embalm bodies in order to preserve them for services and later burial." (Appendix A-5).

**Cleere v. Bullock* — 146 Colo. 284, 361 P.2d 616.

2. That because Arizona has no statutory requirement compelling funeral directors to hire embalmers, the legislature may have believed that in a small community involving "a one-man operation" a funeral director should know how to embalm bodies along with other special knowledge applicable to conducting the final interment of the deceased. (Appendix A-6).

3. That funeral directing has more of the attributes of a "profession" than that of a "commercial business activity" and therefore the ultimate responsibility devolves upon the funeral director to determine whether an embalmer has performed his work properly, making it a reasonable requirement for a funeral director to have the knowledge, qualifications and training of an embalmer. (Appendix A-7).

4. Economic hardship devolving upon the spouses of licensed funeral directors and the estates of deceased funeral directors sanction the exceptions and exemptions set forth in §32-1337, A.R.S. (Appendix A-9).

At the outset it is our respectful submission that Arizona stands alone in upholding the constitutionality of a statute which requires as a prerequisite for the issuance of a funeral director's license that the applicant be qualified as an embalmer. As indicated above, every other jurisdiction where the question has arisen struck down similar legislation because of the denial of either the equal protection clause or the due process clause of the State and Federal Constitutions.

The Arizona court's surmise as to the legislative intent is without support in the record and is destroyed by the effect of the wording and context of the statutes here for review. Throughout the state court's decision the court emphasizes the significance and importance of the practices of embalming and the acts and responsibilities of an embalmer under state law. It is our respectful submission further that the court's preoccupation with the practices and benefits flowing from the embalming of dead human bodies tended to, and did obscure the real issues for decision. This is easily demonstrable because:

1. Embalming is not compulsory. Arizona has no law requiring a dead human body to be embalmed. There are so many well-recognized and ingrained personal preferences, social customs and religious beliefs opposed to the practice of embalming that there is no legislation at all in any state of the union on the subject. *Jackson, The law of Cadavers* 2 ed. p. 438.

2. Arizona law (§32-1361, A.R.S.) provides that if a dead human body is embalmed it must be done by a licensed embalmer. The qualifications required for an embalmer add nothing to his fitness for burying an unembalmed body. To require a licensed embalmer to assist or participate in the burial of an unembalmed body would add nothing to the public health, safety, convenience or morals.

3. The statutory requirement for (§32-1330-2, A.R.S.) that an applicant for a certificate of qualification for a funeral director must have been "for not less than one year previous to the filing of his application a qualified practicing embalmer associated with a qualified practicing funeral director" has no reasonable relationship to the public health, welfare and morals and is therefore an arbitrary and capricious abuse of the police power and this proposition has been unanimously sustained in every state where similar enactments were directly under attack.

4. There is nothing endemic to Arizona by reason of its geographic location or seasonal fluctuations in temperature which is not true of all of the several states bordering Arizona, to-wit: Texas, New Mexico, Nevada and California. Each of these states have large areas of hot arid regions with the extreme fluctuations in temperature as exist in Arizona. It is of particular significance that Arizona adopted the California statute with reference to the business of funeral directors and embalmers. Notable is the fact that the California statute does not require that a funeral director be a qualified embalmer as a condition or prerequisite for licensure. Compare: §6700-9900, *West's Annotated California Business and Professions Code.*

5. The state court's belief that "one-man operations" would be benefited by a requirement that a funeral director be an embalmer is tenuous and misses the mark. Nothing in the Arizona law prevents an embalmer from "free lancing." The Arizona communities are not so widely separated that an embalmer cannot reach any point in the state within 48 hours since this is the criterion obviously applied by the state court and the time limit prescribed by the Arizona State Department of Health, Rules and Regulations, Vital Statistics, Article 5, Part I, Regulation 3 (Appendix A-5).

Furthermore, although the state court seemed to dwell upon the importance of embalming, the above Board of Health Regulation permits and allows a dead human body to be retained for an indefinite period if the same is maintained at a temperature lower than 32°F. Thus the cited regulations will be satisfied if a funeral director merely maintains an icebox large enough to hold dead human bodies at a temperature lower than the prescribed 32°F. We deem that the act of legislation would be equally ridiculous and repugnant to the Fourteenth Amendment if the statute prescribed that every funeral director be a certified refrigeration engineer.

Moreover, the point made in the decision that it is made a crime and unlawful by §32-1368, A.R.S., for an embalmer having knowledge of the fact sufficient to raise a suspicion of a crime related to the cause of death, to embalm a dead human without permission of a coroner, does not militate against the repugnant feature of §32-1330 requiring funeral directors to be embalmers. If the Legislature intended the foregoing act to apply to funeral directors, it could and doubtless would have said so merely by adding those words. Injection into, or treatment of, a human body with chemicals and other preservatives tends to obscure the condition suffered or injury received by the deceased and therefore the statute is restricted to only those who may prevent diagnosis of illness or detection of crime. There is no reason to apply the same restrictions to those dealing with unembalmed bodies because it remains unaltered. The state court implies, contrary to direct statutory definition (§§32-1301(6) and (7)), that funeral directing has more of the

attributes of a "profession" than a "commercial business activity" and thereby the funeral director has a responsibility to the public to determine whether an embalmer has properly performed the embalming process. This reasoning is no more valid than requiring the owner or manager of a drugstore to be a pharmacist. (*Liggett Co. v. Baldrige*, 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57), or requiring a conductor to be a brakeman. (*Smith v. State of Texas*, 34 S.Ct. 681, 233 U.S. 630, 58 L.Ed. 1129) and this same reasoning was rejected in all of the cases cited at page 20 of appellant's opening brief.

From the foregoing it will clearly appear that the statutes in question bear no reasonable relationship to the public welfare, health and morals of the people of the State of Arizona. Such a claim to legislative intent by the members of the Legislature itself would be clearly denied by the effect of §32-1337 which permits and allows the spouse of a deceased funeral director to carry on and conduct (as a licentiate) the business or "profession" of funeral directing without the necessity of being an embalmer. Moreover, the personal representative of such a deceased licensed funeral director, whether individual or corporate, is given the same latitude for a period of nine months. If the Legislature actually considered that the public welfare of the citizens of this state would be endangered or affected by the failure of funeral directors to be qualified embalmers it would have required funeral directors to be embalmers in every case. By allowing some funeral directors and particularly those men and women (the relicts) of deceased licensed funeral directors or untutored corporate fiduciaries to carry on such business is a free and frank admission that no funeral director in Arizona need be an embalmer. The public welfare and health would certainly be jeopardized if any funeral director in this special category were incompetent or careless and allowed dead human bodies to moulder and rot and spread contagion and disease in the community in which the body lay. Can it reasonably be said that the legislature would provide that the public interest be affected or jeopardized in such manner? Isn't it more reasonable to believe that this statute was enacted as a result of a campaign by a powerful, if

rity, pressure group determined to maintain an unlawful opoly and preserve for its members and their spouses a lucra- and non-competitive business.

CONCLUSION

This Court has in two previous cases cited with approval state ourt decisions condemning statutes similar to the one now before he Court as being repugnant to the Fourteenth Amendment. In iggett Co. v. Baldrige, 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57 1928), the decision of *People v. Ringe*, 197 N.Y. 143, 90 N.E. 51 was set forth, and in *Meyer v. Nebraska*, 262 U.S. 390, 67 .Ed. 1042, 43 S.Ct. 625 (1923), the decision of *Wyeth v. Board f Health of Cambridge*, 200 Mass. 474, 86 N.E. 925 (1909) re- ed on.

For the reasons stated herein and in his opening brief, Appellant ubmits the entire Arizona statutes regulating the business of fu- eral directing violates the equal protection clause of the United tates Constitution.

Respectfully submitted,

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